Supreme Court, U.S.
FILED

(1)

No. 93- ~~931~~ 632

APR 14 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JOHNNY ENG,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN L. POLLOK
Attorney for the Petitioner
Johnny Eng
260 Madison Avenue
New York, New York 10016
(212) 679-2900

SW
St. Louis & Westervelt, Inc.
NY (212) 684-3117 NJ (201) 863-8133
Printed on Recycled Paper (4282)

68 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should This Court Review a Significant Expansion of The Concept of Waiver Which Requires Renewal of an Offer of Evidence "Conditionally Excluded" Particularly When The Record Does Not Support The Underlying Proposition That The Exclusion Was in Fact Conditional?

2. Did The Court of Appeals' Circumvention of The Plain Language And Mandate of U.S.S.G. §§3D1.1, *et seq.*, Conflict With Decisions of This Court Governing Statutory Construction?

3. Should This Court Resolve a Direct Conflict Among The Circuit Courts of Appeals Regarding Whether Title 18 U.S.C. §3583(b) Limits Supervised Release For Class A or B Felonies to Terms of Five Years Unless The Sentencing Statute Specifically Requires a Term in Excess of Five Years?

4. Did The Court of Appeals' Decision That Title 18 U.S.C. §3583(b) Does Not Establish a Maximum Supervised Release Term of Five Years For Violations of 21 U.S.C. §841(b)(1)(A), Transgress The Rule of Lenity?

TABLE OF CONTENTS

	Page
Questions Presented For Review	*i*
Table of Contents	*ii*
Appendix Contents	*iv*
Table of Authorities	*v*
Opinion Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement	
A. Introduction	4
B. The Government's Theory And Proof in The Present Case	7
C. The Government's Theory in *United States v. Yu*	10
D. The District Court's Decision	13
E. The Sentence	15
Reasons For Granting The Writ	15
I. The Second Circuit's Decision Requiring Renewal of an Offer of Evidence "Conditionally Excluded," Marks a Significant Expansion of The Concept of Waiver And Was Based Upon a Factual Record Which Simply Does Not Support The Underlying Proposition That The Exclusion Was Conditional	16

Page

II. The Decision of The Court of Appeals Circumventing The Plain Language of The Sentencing Guidelines And Commentary Conflicts With Decisions of This Court Governing Statutory Construction 21

III. The Second Circuit's Determination That 18 U.S.C. §3583(b) Does Not Establish a Maximum Supervised Release Term of Five Years For Class A or B Felonies, Violates The Rule of Lenity 27

Conclusion 30

Page

APPENDIX CONTENTS

APPENDIX A

The Opinion of The United States Court of Appeals For The Second Circuit, Decided January 14, 1994 (14 F.3d 165)..... 1a

APPENDIX B

Decision of The United Stated District Court For The Eastern District of New York, Read Into The Record on November 24, 1992..... 19a

TABLE OF AUTHORITIES

Page

CASES CITED:

Andrews v. Metro North,
882 F.2d 705 (2d Cir. 1989) 18

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 22

Bourjaily v. United States,
483 U.S. 171 (1987) 26

Crandon v. United States,
494 U.S. 152 (1990) 22, 27

Diamond v. Chakrabarty,
447 U.S. 303 (1980) 22, 26

Garcia v. United States,
469 U.S. 70 (1984) 26

Landreth Timber Co. v. Landreth,
471 U.S. 681 (1985) 22

Mistretta v. United States,
488 U.S. 361 (1989) 27

North Dakota v. United States,
460 U.S. 300 (1983) 26

Rodriguez v. United States,
480 U.S. 522 (1987) 26

Page

CASES CITED: (continued)

Schiavone v. Fortune,
477 U.S. 21 (1986) 26

Stinson v. United States,
___U.S.___, 113 S.Ct. 1913 (1993) 27

United States v. Dougherty,
895 F.2d 399 (7th Cir.), *cert. denied*, 497 U.S. 1008 (1990) 17, 19, 20

United States v. GAF Corp.,
928 F.2d 1253 (2d Cir. 1991) 17, 18

United States v. Garcia,
983 F.2d 625 (5th Cir. 1993) 28

United States v. Kattar,
840 F.2d 118 (1st Cir. 1988) 17

United States v. Kelly,
974 F.2d 22 (5th Cir. 1992) 28

United States v. LeMay,
952 F.2d 995 (8th Cir. 1991) 28

United States v. Margiotta,
662 F.2d 131 (2d Cir. 1981), *cert. denied*, 461 U.S. 913 (1983) 18

United States v. McKeon,
738 F.2d 26 (2d Cir. 1984) 18

United States v. Morgan,
581 F.2d 933 (D.C. Cir. 1978) 17

Page

CASES CITED: (continued)

United States v. Plaza Health Laboratories, Inc.,
3 F.3d 643 (2d Cir. 1993) 22

United States v. Ramirez,
894 F.2d 565 (2d Cir. 1990) 18, 19

United States v. Yu, et al.,
No. 88-CR 138(S) (E.D.N.Y. August 31, 1988) .... 4, *Passim*

United States v. Williams,
503 U.S.___, 112 S.Ct. 1112 (1992) 27

STATUTES CITED:

Title 18 U.S.C.,
§3583 28
§3583(b) ..... 2, *Passim*
§3583(b)(1) 16

Title 21 U.S.C.,
§ 841(a)(1) 15
§ 841(b) 15, 28, 29
§ 841(b)(1)(A) 28, 29
§ 841(b)(1)(B) 28, 29
§ 846 15
§ 848(a) 15
§ 952(a) 15

Title 28 U.S.C.,
§ 1254(1) 2

Page

OTHER AUTHORITIES CITED:

Federal Rules of Evidence:
- Rule 104(b) 16
- Rule 801(d)(2) 17
- Rule 801(d)(2)(B) 17, 19
- Rule 801(d)(2)(D) 17, 18

Sentencing Guidelines:
- §2D1.1 ..... 23, 25
- §2D1.5 ..... 23, 25, 26
- §3D1.1 ..... 2, *Passim*
- §3D1.2 ..... 2, *Passim*
- §3D1.2(d) 4, 23, 24
- §3D1.3 ..... 3, 22, 23
- §3D1.3(b) ..... 3, *Passim*
- §3D1.4 ..... 3, 22

McCormick, Evidence, § 58 (1954) 20

In The

Supreme Court of the United States

October Term, 1993

JOHNNY ENG,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Johnny Eng petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals (Appendix A, *infra*) is reported at 14 F.3d 165. The decision of the district court (Appendix B, *infra*) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 3583(b) provides:

> (b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are --
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

The 1987 United States Sentencing Guidelines, §3D1.1 provides:

> **§3D1.1 Procedures for Determining Offense Level on Multiple Counts**
>
> When a defendant has been convicted of more than one count, the court shall:
>
> (a) Group the counts resulting in conviction into distinct Groups of Closely-Related Counts ("Groups") by applying the rules specified in §3D1.2.

> (b) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.
>
> (c) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

The 1987 United States Sentencing Guidelines, §3D1.2, as pertinent, provides:

> **§3D1.2 Groups of Closely-Related Counts**
>
> All counts involving substantially the same harm shall be grouped together into a single Group. * * * Counts involve substantially the same harm within the meaning of this rule:
>
> * * *
>
> (d) When counts involve the same general type of offense and the guidelines for that type of offense determine the offense level primarily on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm. Offenses of this kind are found in Chapter Two * * * Part D (except §§2D1.6-2D3.4). * * *

The 1987 United States Sentencing Guidelines, §3D1.3(b), as pertinent, provides:

> **§3D1.3(b) Offense Level Applicable to Each Group of Closely-Related Counts**
>
> Determine the offense level applicable to each of the Groups as follows:

> (b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve varying offenses, apply the offense guidelines that produces the highest offense level.

STATEMENT

A. Introduction

The Petitioner was charged with importing heroin from Hong Kong for distribution in the United States from 1987 to 1988 by utilizing couriers, parcels delivered by mail, and a bean sprout washing machine in which there was secreted 78 kilograms of heroin.

Petitioner was acquitted of all charges related to the bean sprout machine importation scheme. He was convicted of a continuing criminal enterprise, conspiracy and twelve counts of either importation, distribution or possession of heroin with intent to distribute. All of the substantive charges related solely to the mail parcel delivery scheme.

In the present case, the government's theory was that Eng arranged for certain individuals to receive packages of heroin mailed from Hong Kong and either personally took possession of the heroin or arranged for its delivery to others.

In a prior case, however, the government embraced a much different theory of prosecution. In *United States v. Michael Yu, et al.*, No. 88-CR 138(S) (E.D.N.Y. August 31,

1988), the government claimed that all of the heroin imported through the mails was delivered to or controlled by the defendants then on trial which did not include Eng. Consequently, the Petitioner Eng's name was never mentioned. And, in the case agent's grand jury testimony, the bill of particulars and the prosecutor's summation, the government repeatedly and consistently proffered that the heroin was delivered to the defendants then charged and to no one else.

In the present case, Petitioner attempted to place this reversal of field before the jury by cross-examining the case agent based upon his grand jury testimony in the *Yu* case and by offering to introduce into evidence the bill of particulars and portions of the government's summation from *Yu*. The trial court ruled that Eng could do none of these but that he could call a witness, Tina Wong, who had testified in *Yu* that she delivered the mail parcels in question to individuals other than Petitioner Eng.

On appeal, the court of appeals held that the issue had been waived because Eng failed to renew his motion after it became clear that neither the government nor Eng would call Tina Wong as a witness.

This novel waiver approach marks a significant departure from well-established evidence jurisprudence and will have a significant impact on the fair administration of justice in the federal courts. It therefore, warrants review by this Court.

Two Sentencing Guidelines' issues also warrant consideration by this Court. The first involves interpretation of the grouping provision of §3D1.1, *et seq.* Contrary to the express provisions of those sections, the court of appeals

sanctioned the bifurcation of a single group of offenses in order to circumvent a limitation imposed upon one offense within the group. The court correctly held that all of the counts of conviction should be grouped in a single Group pursuant to Guidelines §3D1.1 as they all involved the same basic conduct, importation and distribution of heroin and the related offenses of conspiracy and continuing criminal enterprise. Inexplicably, the court of appeals then stated that the CCE count could be split off from the remaining counts, thus creating two groups, one comprised solely of the CCE count and the other comprised of the conspiracy and all substantive importation or distribution counts. The 1987 Guidelines specifically prohibited an upward adjustment for role in the offense for CCE offenses but permitted an adjustment for substantive narcotics offenses.

The court of appeals held that removing the CCE count from the remaining counts with which it had properly been grouped, permitted the trial court to adjust for role in the offense with respect to the substantive counts. This procedure, however, is contrary to the explicit provisions of the statute. This holding renders the express statutory provision a nullity, violates the separation of powers doctrine, and invites chaos in the imposition of sentences in multi-count cases.

The second sentencing issue is whether the imposition of a lifetime term of supervised release violates 18 U.S.C. §3583(b), which sets a maximum supervised release term of five years for Class A or B felonies, "except as otherwise provided."

B. The Government's Theory And Proof in The Present Case.

The government's theory in the present case was that the Petitioner Eng controlled the mail parcel importation scheme chiefly through the activities of its prime witnesses Wah Tom Lee and Michael Yu.[1]

The evidence concerning this scheme, as summarized by the Court of Appeals, is as follows:

> Sometime in mid-1987, Eng asked Wah Tom Lee and Michael Yu to recruit individuals to receive drugs sent in parcels from Hong Kong. Yu and Lee procured the names of three individuals, Tina Wong, Cathy Leung, and a woman known as Helen (or "Ah Ling"), who were willing to receive the packages in return for $20,000 a piece. After Wong received the first parcel, Eng instructed Yu and Lee to go to Wong's apartment to inspect it. They found that the parcel contained stuffed animals, peppers, and numerous tea boxes. The tea boxes contained seven kilograms of heroin. Several days later, Eng instructed Lee to deliver the heroin to him near a bakery in New York City's Chinatown. At Lee's instruction, Wong brought the heroin to a meeting place near the bakery, met Wong and Eng there, and then transferred the package to Eng. Eng paid Lee and Yu $50,000, of which $20,000 was given to Wong.

---

[1] Their stories, which formed the linchpin of the government's case against Petitioner, were rife with self-contradiction and of dubious credibility. *See* comments by Judge Raggi at TR. 830-31 and 1075-76.

A week later, Eng called Lee to inform her that a second parcel would arrive soon. Lee, in turn, called Tina Wong, who notified Cathy Leung. After receiving the package, Leung took it to Wong's apartment. Wong examined its contents and informed Lee how much heroin it contained. Lee called Eng to confirm the delivery. Eng instructed her to leave the heroin in Wong's apartment. Later at a party at his house, Eng asked Lee to deliver the parcel to someone named "Lap." Lee arranged for Wong to deliver the heroin to Lap the following day. Eng again gave Lee and Yu $50,000 for the delivery, and Lee in turn gave $20,000 to Leung and $10,000 to Wong.

Following the second delivery, Lee and Yu accompanied Eng to Hong Kong at Eng's expense. Eng introduced Lee and Yu to "Ming," the person who was sending the heroin parcels and told Ming to contact Yu and Lee if he was not available. Lee provided Eng with a list of four more people willing to receive packages.

Shortly after the group returned from Hong Kong, four more packages were delivered, each containing seven kilograms of heroin. The third parcel was delivered to Cathy Leung's residence. With Eng's permission, Lee sold a portion of the heroin to Ching-Yi Chen. Sometime around the delivery of the third parcel, Lee and Yu, with Eng's permission, began selling the heroin themselves. Also, at about this time, Lee and Yu again traveled to Hong Kong, at Eng's direction, this time accompanied by Tina Wong and two other women. The five of them concealed more than half-a-million dollars on their persons for delivery to Ming.

The fourth parcel was delivered to "Helen," and then transferred to Wong's residence. Lee again sold part of the heroin in this parcel to Ching-Yi-Chen. The fifth parcel arrived at Agnes Chin's residence, and was stored in Wong's house. Once again, Lee sold part of the heroin in the parcel to Chen. The sixth parcel was delivered in December 1987 or January 1988 to "Helen," who transferred it to Lee. The seventh parcel arrived at Gwendolyn Chan's residence and was later delivered by Lee to a man named Dai Gow.

The eighth shipment arrived in January or February of 1988 at Agnes Chin's residence. The package was transferred to Lee, who delivered it to Eng by placing it in his jeep.

On February 9 and 10, 1988, three more boxes from Hong Kong containing heroin and addressed to residences in the New York metropolitan area arrived at customs in California. One of these packages was marked for delivery to a "M. Hsieh" at Gwendolyn Chan's address. The Drug Enforcement Administration then conducted a "controlled delivery," which resulted in Chan's arrest when she accepted delivery of the parcel. Chan agreed to cooperate, and the conspiracy began to unravel. Chan's cooperation led to the arrest of Leung, who also agreed to cooperate. Leung's cooperation led to the arrest of Lee, Yu, and Tina Wong in early March, 1988.

(App. A at 3a - 6a).

C. The Government's Theory in United States v. Yu.

In August, 1988, six defendants, including Wah Tom Lee and Michael Yu, were tried for conspiracy to distribute and to possess with intent to distribute narcotics along with a number of substantive charges of importing and distributing heroin concealed in eight mail parcels shipped to the United Stated from Hong Kong from in or about mid-June, 1987, through the end of February, 1988. The basis for these charges were precisely the same as those in Counts 3 through 18 of the indictment against the Petitioner. Indeed, the Petitioner Eng is charged with importing and distributing the very same eight mail parcels which were involved in the *Yu* case (A 75).[2]

During the prosecution of Yu and Lee, three accomplice witnesses, including Tina Wong, Cathy Leung, and Gwendolyn Chan, testified for the government. Though Leung also testified in this case, the government did not call Tina Wong whose testimony in the *Yu* trial was wholly contrary to the government's theory in the instant prosecution. In *Yu*, Tina Wong testified that she was recruited by Lee to accept mail parcels and that the first mail parcel, with which she was involved, was mailed directly to her home in Chinatown. Wong also admitted that she accepted delivery of the second, third and fourth mail parcels from Cathy Leung and a Chinese woman named Helen, which she stored at her apartment. Significantly, Wong testified that at the instructions of Lee, she delivered the heroin contained in these four separate mail parcels to

---

2 "A" refers to the Joint Appendix.

a woman named Ching-Yi Chen, a defendant in the *Yu* case. *(Id)*.

In this case, Lee testified in a wholly contrary manner. She maintained that the heroin mailed to the United States was delivered not to Chen but to the defendant at a restaurant on Lafayette Street or to an individual named "Lap" at the defendant's direction (TR. 610-613, 615-617). Based upon all of the testimony given at the *Yu* trial, including the testimony of Tina Wong, the prosecutrix, in summation in that case, stated to the jury that:

> [Tina Wong] kept the [first] box in her house for approximately three days when Wah Tom Lee called and told her to take out one or two of the tea boxes and to deliver them to a girl named Ching-Yi at 50 Bayard Street. Wah Tom Lee gave Tina Wong these telephone instructions several times until all the tea boxes from within the box from Hong Kong were delivered to Ching-Yi Chen's house.

(A. 107).

Regarding the delivery of the second box, the prosecutrix argued:

> Now, Tina Wong opened this second box that was delivered to her house by Cathy Leung. They found inside stuffed animals, herbs, dried peppers and tea boxes just as in the other box. At Wah Tom Lee's instructions, Tina Wong delivered one or two of the tea boxes at a time to Ching-Yi Chen's apartment at 50 Bayard Street, Apt. 7A.

(A 113).

In addition, the government relied on Ms. Wong to support an entirely different theory concerning these deliveries then was alleged in Petitioner's case. For example, the prosecutrix described the "ring leaders" of this heroin conspiracy as Michael Yu and Wah Tom Lee. In her rebuttal summation, the prosecutrix argued "in a classic tactic to divert your attention from the defendants sitting at this table, what the defense counsel have tried to do is to say there were other people involved in the heroin conspiracy and who could those other people be? (A 151). The government's argument went on to establish that there were no other possible conspirators (A. 160).

Finally, Ms. Wong's credibility was strongly affirmed by the government. In the *Yu* case, the government repeatedly argued in support of Tina Wong's credibility, emphasizing the witness' plea agreement as a guarantor of reliability.

> Now the motive for Tina Wong, Gwendolyn Chan and Cathy Leung to do that is their cooperation agreements with the government. Each one of these witnesses in their cooperation agreements with the government were allowed to plead guilty to a reduced charge that carries a penalty of zero to 20 years in prison. In return they had to testify truthfully, and they told you that.
>
> The plea agreements between the government, Tina Wong, Cathy Leung and Gwendolyn Chan are all in evidence and I encourage you to read these agreements, and you can read them carefully and you can see what the agreement is between the government and these three witnesses.

(A. 98).

This was not simply a matter of commenting on the credibility of a witness. Rather, the government argued that Ms. Wong's truthful testimony supported the very charges brought against the defendants then on trial.

In addition the government in the *Yu* case submitted a bill of particulars indicating that the heroin obtained from the first two mail parcels was delivered to Ching-Yi Chen and not as claimed here to Petitioner Eng (A 84-85).

Finally, Petitioner sought to cross examine Special Agent Mitesser in connection with his grand jury testimony in the *Yu* case regarding the disposition of the heroin contained in the first several mail parcels. That grand jury testimony was as follows: On March 14, 1988, agent Mitesser testified in the grand jury in summary fashion that Cathy Leung and Tina Wong had told him that Tina Wong "delivered to an individual by the name of Ching-Yi Chen all four boxes of heroin that she had received in the mail." (A. 193). On April 4, 1988, Agent Mitesser further testified that "approximately in June or July of 1987, Tina Wong received a box at her residence that she signed for. Eventually that box was delivered to Ching-Yi Chen... The second box was July or August, 1987. This box was received by Kathy [sic] Leung at her residence and eventually the box was delivered to Tina Wong and Tina Wong eventually delivered the contents of that box to Ching-Yi Chen." (A. 210-11).

D. <u>The District Court's Decision.</u>

After written submissions and extensive argument, the district court denied Eng's motion to examine the case agent based upon his grand jury testimony and to accept

into evidence the bill of particulars and portions of the prosecutrix' summation in the *Yu* case (App. B). While the trial court did think it significant that Eng was prepared to call Tina Wong as a witness if the government did not (*Id.* at 22a), she did not make a provisional determination. Rather, Judge Raggi held that the Petitioner was absolutely precluded from offering this evidence but could explore inconsistencies in the witnesses' versions of events by examining those witnesses, including Tina Wong:

> I do not want the focus to turn on who the government believed, when and why they believed that person. Just as I would never allow the government to vouch for a witness, whether that witness had appeared for the first time or six times previously and believed all the other times, so I will not allow the defense to put in what I see as really extraneous factors with considerable risks for prejudice, when in essence it can make it's argument effectively by calling the witnesses themselves and having them testify about the prior occasion on which they have testified.

(App.B at 26a-27a) (emphasis added).

The trial court did not make its ruling contingent upon the defense calling Tina Wong, but rather, held that the defense could call Tina Wong and that it would not permit the introduction of "extraneous factors."

Indeed, the trial court and the parties clearly believed that this decision was final and sufficiently preserved the issue for appellate review. Thus, the court stated at the conclusion of its decision:

> I'm sure that is not the clearest []enunciation of my ruling because of the time. I think you have the general idea and will have it preserved if it has to be reviewed.

(*Id.* at 28a) (emphasis added).

E. The Sentence

Eng was convicted of the continuing criminal enterprise count, 21 U.S.C. §848(a), one count of conspiracy to distribute and possess with intent to distribute heroin, 21 U.S.C §846, 841(b), and twelve counts of either importation, 21 U.S.C. §952(a), or distribution and possession with intent to distribute heroin, 21 U.S.C. §841(a)(1). He was sentenced under the 1987 version of the Sentencing Guidelines, on the CCE count to 151 months imprisonment and 3 years supervised release. On the conspiracy and each of the substantive drug offenses, he was sentenced to 292 months imprisonment followed by a life term of supervised release, all of the sentences to run concurrently (App. A at 7a).

REASONS FOR GRANTING THE PETITION

This case presents several important questions of federal law. First, whether a decision that a litigant is precluded from introducing relevant evidence because there is available an alternative means of presenting some aspects of that proof, constitutes a conditional ruling which is waived if the offer is not renewed at the close of the case. Second, whether Sentencing Guidelines §3D1.1, *et seq.*,

require that like counts be grouped into a single Group or whether it permits counts properly grouped to be subsequently severed if the result of grouping is deemed unsatisfactory by the court; And, third, whether a life term of supervised release violates 18 U.S.C. §3583(b)(1), which sets a maximum supervised release term of five years for Class A or B felonies, "[e]xcept as otherwise provided."

In addition to the intrinsic importance of these issues, they require the attention of this court to resolve a conflict of decisions among the circuits in addressing the third issue.

Finally, this court's intervention is required to remedy the court of appeals' resolution of the second issue, regarding interpretation of Guidelines §3D1.1, in a manner that conflicts with decisions of this court governing statutory construction.

I. The Second Circuit's Decision Requiring Renewal of an Offer of Evidence "Conditionally Excluded," Marks a Significant Expansion of The Concept of Waiver And Was Based Upon a Factual Record Which Simply Does Not Support The Underlying Proposition That The Exclusion Was Conditional.

The Second Circuit expanded the concept of waiver by holding that motions to admit relevant evidence conditionally excluded must be renewed if the condition is not met or the issue is waived. The court reasoned by analogy to a Seventh Circuit decision which held that when evidence is admitted conditional (*see* Rule 104(b), F.R.Evid.), the party seeking to exclude the evidence must renew the objection if the condition is not satisfied. *United States v. Dougherty*, 895 F.2d 399, 403-04 (7th Cir.), *cert.*

denied, 497 U.S. 1008 (1990), (App. A at 9a-10a). This significant expansion of evidence jurisprudence should not rest upon a factual foundation which simply does not support the underlying predicate, *i.e.*, that the district court's ruling was conditional.

Based upon written submissions and extensive oral argument (A. 217-59), the Petitioner sought to introduce portions of the prosecutrix' summation, the bill of particulars and the case agent's grand jury testimony in *United States v. Yu*, which concededly are in conflict with the government's theory in the petitioner's case.

The prosecutrix' summation was offered pursuant to Federal Rules of Evidence 801(d)(2)(B), as a statement of a party opponent of which the party has manifested an adoption of belief in its truth; and second, the summation is admissible pursuant to 801(d)(2)(D), as a statement by a party's agent concerning a matter within the scope of the agency.

It is now well established that the government is a "party opponent" for purposes of rule 801(d)(2) in a criminal case. *United States v. GAF Corp.*, 928 F.2d 1253, 1259-1260 (2d Cir. 1991), *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988) and *United States v. Morgan*, 581 F.2d 933, 937n.10 (D.C. Cir. 1978). Consequently, the statements of a Justice Department attorney acting within the scope of his employment, which manifest an adoption or belief in the truth of a statement makes those statements admissible against the government as a party-litigant.

The United States Attorney's statements during closing argument are also admissible pursuant to Rule 801(d)(2)(D), because such "statements made by an attorney, including

arguments to a jury concerning a matter within his employment, may be admissible against the party retaining the attorney." *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984); *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981) *cert. denied*, 461 U.S. 913 (1983).

The bill of particulars from the *Yu* case was also submitted.

Paragraphs one and two of the *Yu* bill of particulars stated that the heroin from the first two mail parcels were delivered to Ching-Yi Chen. This, of course, was wholly inconsistent with the prosecution's theory against the Petitioner and should have been admitted as an inconsistent prior pleading by a party. *United States v. GAF Corp.*, 928 F.2d 1253, 1259-1262 (2d Cir. 1991). Citing *McKeon*, the *GAF* Court noted that "the law is quite clear that superseded pleadings in civil cases may constitute admissions of party opponents admissible in the case in which they were originally filed, as well as any subsequent litigation involving the party." *Id.* at 1259. As the *GAF-McKeon* Courts made clear, the rationale for the rule is to prevent a party (here the government) from advancing one version of the facts in a pleading, change versions and amend pleadings "safe in the belief that the trier of fact will never learn of the change in stories." *Id. See also Andrews v. Metro North*, 882 F.2d 705 (2d Cir. 1989) and *United States v. Ramirez*, 894 F.2d 565, 570 (2d Cir. 1990) (hearsay statements of government agent in sworn search warrant application may constitute admissions of a party opponent and may be used against the government).

Finally, the Petitioner sought to cross-examine Agent Mitesser in connection with portions of his grand jury

testimony relating to the receipt of the mail parcels. (A. 222-38).

Second Circuit precedent suggests that such cross-examination was proper. Thus in *United States v. Ramirez*, 894 F.2d 565, 570 (2d Cir. 1990), the court stated:

> When the government advances a statement of its agent in a judicial proceeding to obtain a search warrant, the government has adopted the content of the statement, and a criminal defendant may introduce the statement as a party admission under Fed. R. Evid. 801(d)(2)(B)." (citations omitted)

The court of appeals, however, never reached this issue. It determined that the proffered evidence had been "in effect, conditionally excluded," (App. A at 10a). By analogy to a Seventh Circuit decision that if evidence is admitted conditionally, the party seeking its exclusion must renew the objection if the condition is not met, *United States v. Dougherty*, 895 F.2d 399, 403-04 (7th Cir.), *cert. denied*, 497 U.S. 1008 (1990), the court of appeals held the Petitioner had waived any objection to the exclusion of this evidence by failing to renew his offer at the conclusion of the case (App. A at 9a - 10a).

When evidence is conditionally admitted, all parties clearly understand that the condition must be satisfied or, upon motion, it will be excluded. This is patent when evidence is admitted subject to connection, or subject to a proper foundation later being established or, as in *Dougherty*, subject to a certified copy being substituted for an uncertified copy. All concerned and particularly the objecting party, are on notice that unless the condition is

fulfilled, the evidence is subject to exclusion provided the party seeking exclusion renews the objection and moved to strike the evidence at the appropriate time. *McCormick*, Evidence, §58 (1954).

A conditional exclusion is a horse of a much different stripe. Unless the court states that the evidence is excluded subject to a specific condition, how are the parties to know that the offer will be re-considered upon failure of that condition?

In the present case, the trial court never said that it was excluding the evidence conditionally. It never said that the proffered evidence could be admitted if Tina Wong was not called as a witness, or even that it would reconsider its ruling if she was not called. Furthermore, a conditional ruling was clearly unnecessary. The issue could have been and was finally determined based upon the availability of Wong as a witness and not whether any party actually called her to the witness stand.

This was the clear import of the district court's decision. Indeed, at the conclusion of her decision, Judge Raggi stated:

> I think you have the general idea and will have it preserved if it has to be reviewed.

(App. B at 28a).

When a trial court explicitly states that its determination has preserved an issue for review, it is singularly inappropriate for an appellate court to "read" into that decision an implied condition. The more so when that implication involved a condition of exclusion, which is rarely encountered in the law.

An expansion of the waiver concept to preclude an issue of conditional exclusion of evidence unless the party proponent has renewed the application for its admission, should not rest upon so broken a reed. This Court should consider this issue in order to insure that an expansion of a federal rule of evidence is not based upon an inadequate factual predicate. This particular issue should be remanded for a determination of the underlying issues. An expansion, if any, of the waiver concept to include failure to renew a motion to admit conditionally excluded evidence, should await an appropriate vehicle, which perforce excludes the present litigation.

II. The Decision of The Court of Appeals Circumventing The Plain Language of The Sentencing Guidelines And Commentary Conflicts With Decisions of This Court Governing Statutory Construction.

The express language of the Sentencing Guidelines and Commentary require that all counts of conviction be grouped together to determine the offense level. Because in this case that singular Group included Petitioner's CCE conviction, the Guidelines applicable thereto specifically preclude an adjustment for his role in the offense.

Dissatisfied with this result, the court of appeals in derogation of long-standing precedents of this court governing statutory construction, disregarded the explicit statutorily mandated procedure. Thus, the court split the single Group mandated by the Guidelines into two subgroups: one comprised of only the CCE count and the other comprised of the remaining offenses; subjected the subgroup sans the CCE count, to a four-point adjustment

for role in the offense; and only then recombined the groups.

As this court has repeatedly observed, the starting point of statutory construction is the statute itself, *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). And, when the statute is penal in nature, any ambiguities must be resolved in the defendant's favor. *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993), *citing inter alia, Crandon v. United States*, 494 U.S. 152, 168 (1990).

The procedure for determining offense levels when a defendant has been convicted of multiple counts is governed by U.S.S.G. §3D1.1, which provides:

> **§3D1.1 Procedure for Determining Offense Level on Multiple Counts**
>
> When a defendant has been convicted of more than one count, the court shall:
>
> (a) Group the counts resulting in conviction into distinct Groups of Closely-Related Counts ("Groups") by applying the rules specified in §3D1.2.
>
> (b) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.
>
> (c) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

In this case, all concerned agreed that all fourteen counts of which Petitioner was convicted, should be part of a single Group pursuant to U.S.S.G. §3D1.2(d). That

section provides, in pertinent part:

> **§3D1.2 Groups of Closely-Related Counts**
>
> All counts involving substantially the same harm shall be grouped together into a single Group. * * * Counts involve substantially the same harm within the meaning of this rule:
>
> * * *
>
> (d) When counts involve the same general type of offense and the guidelines for that type of offense determine the offense level primarily on the basis of the total amount of harm or loss, the quantity of a substance involve, or some other measure of aggregate harm. Offenses of this kind are found in Chapter Two * * * Part D (except §§2D1.6-2D3.4). * * *

The next procedural step was to "[d]etermine the offense level applicable to each group by applying the rules specified in §3D1.3." [U.S.S.G. §3D1.1(b) (emphasis added)].

As all of Petitioner's counts are found in Chapter Two, Part D §§2D1.1-2D1.5, they were correctly grouped together into a "single Group" and when the counts of conviction comprise a single Group pursuant to U.S.S.G. §3D1.2(d), the applicable offense level is controlled by U.S.S.G. §3D1.3(b):

> **§3D1.3(b) Offense Level Applicable to Each Group of Closely-Related Counts**
>
> Determine the offense level applicable to each of the Groups as follows:
>
> (b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level

> applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve varying offenses, apply the offense guideline that produces the highest offense level. (emphasis added).

The plain language of §3D1.3(b) mandates application of Parts A, B, & C, which include adjustments for role in the offense to "a Group" in the singular. There is no provision for the creation of sub-groups and, *a fortiori*, no procedure to apply Parts A, B & C adjustments to sub-groups.

The plain language of §3D1.3(b) is reinforced by the Commentary. Thus, Application Note 3 provides as follows:

> 3. When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines (e.g., theft and fraud), use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B and C apply based upon the combined offense behavior taken as a whole. (emphasis added)

Applying the precise language of the statute and Application Note results in the following calculation of Petitioner's offense level. All counts are combined into a single Group. The offense level for the Continuing Criminal Enterprise count is 32 pursuant to U.S.S.G. §2D1.5.[3] The

---

[3] The 1987 Guideline for CCE was 32 for a first conviction, 38 for any subsequent CCE conviction, and 43 if the defendant was "the principal administrator, leader or organizer" and the amount involved was at least 300 kilograms of heroin.

offense level for the remaining counts based upon the aggregate amount of drugs is 36, U.S.S.G. §2D1.1

Because "the counts in the Group are covered by different guidelines," we use the guideline that produces the highest offense level of 36, *see* U.S.S.G. §3D1.3(b) and Application Note 3. Only then do we "[d]etermine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B and C apply based upon the combined offense behavior taken as a whole." The combined offense behavior of the Group necessarily includes the CCE count. In formulating Guidelines for Continuing Criminal Enterprise offenses, the Sentencing Commission fully and adequately reflected the participant's leadership role in a "large scale drug operation." Therefore, the Guidelines specifically prohibit any adjustment for a defendant's role in the offense when he has been convicted of a CCE violation:

> The base offense levels for continuing criminal enterprises are mandatory minimum sentences provided by the statute that mandate imprisonment for leaders of large scale drug enterprises. A conviction establishes that the defendant controlled and exercised decision-making authority over one of the most serious forms of ongoing criminal activity. Therefore an adjustment for role in the offense in Chapter Three, Part B, is not applicable.

U.S.S.G. §2D1.5, Background Note. Therefore, the Petitioner was not subject to an adjustment for role in the offense. This result may not have accorded with the court of appeals' view of an appropriate sentencing range in this case. Nevertheless, the court of appeals was bound to

follow the clear language of the statute.

The plain meaning of a statute must control absent a clearly expressed legislative intention to the contrary. *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Garcia v. United States*, 469 U.S. 70, 75 (1984) (when the terms of a statute are unambiguous, judicial inquiry is complete; "only the most extraordinary showing of contrary intentions would justify a limitation of the 'plain meaning' of the statutory language"); *see also Bourjaily v. United States*, 483 U.S. 171 (1987) ("It would be extraordinary to require legislative history to confirm the plain meaning of Rule 104 ... we think that the Rule is sufficiently clear that ... the rule prevails." (footnote omitted) (emphasis in original)); *Rodriguez v. United States*, 480 U.S. 522 (1987) (*per curiam*) (where "the language of a provision is sufficiently clear in its context and not at odds with the legislative history, '[there is no occasion] to examine the additional considerations of "policy" ... that may have influenced the lawmakers in their formulation of the statute.'" (citations omitted)); *Schiavone v. Fortune*, 477 U.S. 21 (1986) (courts must follow "plain language" of F.R.Civ.P.15 (c); "accept the Rule as meaning what is says"); cf., *Diamond v. Chakrabarty*, 447 U.S. at 308 ("Unless otherwise defined, words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning...").

The Sentencing Guidelines have the force of law in that they "bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Stinson v. United States*, ____U.S.__, 113 S.Ct. 1913, 1917 (1993), *quoting Mistretta v. United States*, 488 U.S. 361, 391 (1989). Thus, the Guidelines themselves are

binding upon the courts as are policy statements and even commentary to the extent that commentary "functions to interpret [a] guideline or explain how it is to be applied." *Id.* at 1917-20, *quoting United States v. Williams*, 503 U.S.____, 112 S.Ct. 1112, 1120 (1992).

Moreover, because the Sentencing Guidelines are penal in nature, the court of appeals' expansive reading conflicts with the well-established doctrine that penal statutes should be strictly construed and any ambiguities resolved in favor of lenity. *Crandon v. United States, supra.*

III. The Second Circuit's Determination That 18 U.S.C. §3583(b) Does Not Establish a Maximum Supervised Release Term of Five Years For Class A or B Felonies, Violates The Rule of Lenity.

The final issue requiring this Court's attention, involves the court of appeals' refusal to follow established precedents of this court holding that penal statutes are subject to the rule of lenity. Thus, the Second Circuit held that 18 U.S.C. §3583(b) does not limit supervised release for Class A or B felonies to terms to five years. This issue also should be addressed to resolve a split of opinion among the circuit courts of appeal. The Eighth Circuit agrees with the Second, *see United States v. LeMay*, 952 F.2d , 995, 998 (8th Cir. 1991), While the Fifth Circuit has held that 18 U.S.C. § 3583 does limit to five years supervised release terms for Class C felonies. *See United States v. Garcia*, 983 F.2d 625, 630 (5th Cir. 1993), *United States v. Kelly*, 974 F.2d 22, 24-25 (5th Cir. 1992).

As noted by the court of appeals, the interplay of 18 U.S.C. §3583(b), which establishes a maximum supervised

release term of five years for Class A or B felonies, "[e]xcept as otherwise provided," and 21 U.S.C. §841(b), results in three variations of the problem. The first occurs when the minimum period of supervised release is less than the five-year maximum. (*See,* 21 U.S.C. §841(b)(1)(B) establishing a four-year minimum term.) The second is when the minimum and maximum terms are identical as in the instant case, where the minimum, pursuant to 21 U.S.C. § 841(b)(1)(A) for a first offender, is five years and the maximum is also five years. The third category arises when the minimum term exceeds the maximum, such as occurs when the defendant is a repeat offender under §841(b)(1)(A) (10-year minimum term of supervised release) or §841(b)(1)(B) (8-year minimum) (App. A at 16a).

The petitioner below contended the phrase "except as otherwise provided..." is ambiguous and that the rule of lenity requires that it be limited to cases in which the minimum term of supervised release is longer than five years, *i.e.,* the third category under §841(b).

The court of appeals agreed that cases within the third category come within the exception to the five-year maximum "because they require a supervised release term higher than the maximum allowed by §3583(b)." (*Id.* at 16a-17a) (emphasis in original). The court also conceded that Petitioner's reading of the statute presented one valid interpretation of its language but rejected that interpretation because the court believed that this is not what Congress expected:

> Though it would be possible, as Eng argues, to interpret the "except as otherwise provided" clause to authorize longer supervised release terms only where

> another statute specifically requires such terms (*i.e.*, the third category, described above), we think it is evidence that Congress expected the proviso to have a broader effect.

(App. A at 18a).

Having found that Petitioner's understanding of the statute is one valid interpretation, the court of appeals surprisingly refused to apply the rule of lenity in Petitioner's favor "[b]ecause we do not find the penalty statute to be ambiguous." (*Id.* n.7).

This Court should address this issue to resolve the conflicting interpretations of §3583(b) among the circuit courts of appeals and to correct the failure to apply the rule of lenity to this clearly ambiguous statute.

CONCLUSION

For The Reasons Stated, This Court Should Grant The Petition For Certiorari to Consider The Important Questions Presented.

Dated: *New York, New York*
April 14, 1994

Respectfully submitted,

JOHN L. POLLOK
Attorney for the Petitioner
Johnny Eng
260 Madison Avenue
New York, New York 10016
(212) 679-2900

No. 93-_____

In The

Supreme Court of the United States

October Term, 1993

JOHNNY ENG,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Second Circuit

APPENDIX

Appendix A - Order of Affirmance of The United States Court of Appeals For The Second Circuit, Decided January 14, 1994 [Pages 1a - 18a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 229—August Term 1993

Argued: October 15, 1993 Decided: January 14, 1994

Docket No. 93-1197

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHNNY ENG,

Defendant-Appellant.

Before:

NEWMAN, *Chief Judge*, KEARSE, *Circuit Judge*, and TENNEY,* *District Judge*.

Appeal from the March 18, 1993, judgment of the United States District Court for the Eastern District of New York (Reena Raggi, Judge) convicting defendant of

---

* The Honorable Charles H. Tenney of the United States District Court for the Southern District of New York, sitting by designation.

narcotics offenses and imposing a sentence that includes a lifetime term of supervised release.

Affirmed.

JOHN L. POLLOK, New York, N.Y. (Susan C. Wolfe, Hoffman & Pollok, New York, N.Y., on the brief), *for defendant-appellant.*

CATHERINE E. PALMER, Asst. U.S. Atty., Brooklyn, N.Y. (Zachary W. Carter, U.S. Atty., Susan Corkery, Asst. U.S. Atty., Brooklyn, N.Y., & Karen Patton Seymour, Asst. U.S. Atty., New York, N.Y., on the brief), *for appellee.*

JON O. NEWMAN, *Chief Judge*:

This appeal primarily concerns the authorized terms of supervised release for those convicted of drug offenses. The general statute establishing supervised release terms provides that for Class A and Class B felonies, the maximum supervised release term is five years. 18 U.S.C. § 3583(b) (1988). However, the statute establishing drug offense penalties provides that, for offenses above stated minimum quantities, a sentence must include a term of supervised release of at least five years, implying that a longer term is permissible. 21 U.S.C. § 841(b)(1)(A) (1988). Johnny Eng appeals from the March 18, 1993, judgment of the District Court for the Eastern District of New York (Reena Raggi, Judge) convicting him of drug

offenses and imposing a sentence that includes a lifetime term of supervised release. We conclude that Congress intended the sentencing authority granted in section 841(b)(1)(A) to override the limitations in section 3583(b), at least in cases such as Eng's, reject Eng's other contentions, and therefore affirm.

Background

The Government charged Eng with running a heroin trafficking operation that imported heroin from Hong Kong for distribution in the United States from 1987 to 1988. The evidence showed that Eng employed three different methods to import the drugs—possession by couriers who flew into John F. Kennedy International Airport, packaging in parcels mailed from Hong Kong, and concealment inside a bean sprout washing machine imported from Hong Kong.

In early 1987, Eng paid Wah Tom Lee $50,000 for each of six shipments of heroin that she picked up from couriers traveling through Kennedy Airport. The total amount of heroin delivered through this method was 66 kilograms. The bean sprout washing machine was used to conceal 78 kilograms of heroin sent from Hong Kong. Though Eng was acquitted of the charges related to the washing machine importation scheme, the 78 kilograms of heroin were considered by the Judge at sentencing.

The details of the mail package smuggling scheme are pertinent to the evidentiary issue in this case. Sometime in mid-1987, Eng asked Wah Tom Lee and Michael Yu to recruit individuals to receive drugs sent in parcels from Hong Kong. Yu and Lee procured the names of three individuals, Tina Wong, Cathy Leung, and a woman known as

Helen (or "Ah Ling"), who were willing to receive the packages in return for $20,000 apiece. After Wong received the first parcel, Eng instructed Yu and Lee to go to Wong's apartment to inspect it. They found that the parcel contained stuffed animals, peppers, and numerous tea boxes. The tea boxes contained seven kilograms of heroin. Several days later, Eng instructed Lee to deliver the heroin to him near a bakery in New York City's Chinatown. At Lee's instruction, Wong brought the heroin to a meeting place near the bakery, met Wong and Eng there, and then transferred the package to Eng. Eng paid Lee and Yu $50,000, of which $20,000 was given to Wong.

A week later, Eng called Lee to inform her that a second parcel would arrive soon. Lee, in turn, called Tina Wong, who notified Cathy Leung. After receiving the package, Leung took it to Wong's apartment. Wong examined its contents and informed Lee how much heroin it contained. Lee called Eng to confirm the delivery. Eng instructed her to leave the heroin in Wong's apartment. Later, at a party at his house, Eng asked Lee to deliver the parcel to someone named "Lap." Lee arranged for Wong to deliver the heroin to Lap the following day. Eng again gave Lee and Yu $50,000 for the delivery, and Lee in turn gave $20,000 to Leung and $10,000 to Wong.

Following the second delivery, Lee and Yu accompanied Eng to Hong Kong at Eng's expense. Eng introduced Lee and Yu to "Ming," the person who was sending the heroin parcels, and told Ming to contact Yu and Lee if he was not available. Lee provided Eng with a list of four more people willing to receive packages.

Shortly after the group returned from Hong Kong, four more packages were delivered, each containing seven

kilograms of heroin. The third parcel was delivered to Cathy Leung's residence. With Eng's permission, Lee sold a portion of the heroin to Ching-Yi Chen. Sometime around the delivery of the third parcel, Lee and Yu, with Eng's permission, began selling the heroin themselves. Also, at about this time, Lee and Yu again traveled to Hong Kong, at Eng's direction, this time accompanied by Tina Wong and two other women. The five of them concealed more than half-a-million dollars on their persons for delivery to Ming.

The fourth parcel was delivered to "Helen," and then transferred to Wong's residence. Lee again sold part of the heroin in this parcel to Ching-Yi Chen. The fifth parcel arrived at Agnes Chin's residence, and was stored in Wong's house. Once again, Lee sold part of the heroin in the parcel to Chen. The sixth parcel was delivered in December 1987 or January 1988 to "Helen," who transferred it to Lee. The seventh parcel arrived at Gwendolyn Chan's residence, and was later delivered by Lee to a man named Dai Gow.

The eighth shipment arrived in January or February of 1988 at Agnes Chin's residence. The package was transferred to Lee, who delivered it to Eng by placing it in his jeep.

On February 9 and 10, 1988, three more boxes from Hong Kong containing heroin and addressed to residences in the New York metropolitan area arrived at customs in California. One of these packages was marked for delivery to a "M. Hsieh" at Gwendolyn Chan's address. The Drug Enforcement Administration then conducted a "controlled delivery," which resulted in Chan's arrest when she accepted delivery of the parcel. Chan agreed to cooperate, and the conspiracy began to unravel. Chan's coop-

eration led to the arrest of Leung, who also agreed to cooperate. Leung's cooperation led to the arrest of Lee, Yu, and Tina Wong in early March 1988.

The Government presented a somewhat different version of events in *United States v. Michael Yu, et al.*, No. 88-CR-138(S) (E.D.N.Y. Aug. 31, 1988). In that case, the Government prosecuted Eng's co-conspirators in the heroin importation scheme. The Government charged Wah Tom Lee and Michael Yu, along with four others, with conspiracy to distribute drugs and importation and distribution of heroin imported via mail parcels shipped to the United States from Hong Kong. The charges stemmed from the same mail parcel deliveries that formed the basis for the indictment against Eng.

In *Yu*, the Government argued that Tina Wong had delivered the first two packages to Ching-Yi Chen, while in the instant case the Government claimed that Wong delivered the first package to Eng (via Lee) and the second package to "Lap" (at Eng's direction). In the Government's version of events as portrayed at the instant trial, Ching-Yi Chen shows up as a buyer only late in the scheme when Yu and Lee had begun selling the drugs themselves.

The Government explains its changed version of Chen's role as resulting from a reevaluation of Tina Wong's veracity. After the *Yu* trial, the Government interviewed Wong and gave her a polygraph examination. Following its reconsideration of Wong's testimony, the Government agreed to the vacation of Ching-Yi Chen's conviction in light of the new information. On this appeal, the Government admits that Johnny Eng's name was not mentioned in the earlier trial: "At no time during the *Yu* trial was Johnny Eng's name mentioned, since Lee and Yu

were the persons in the heroin conspiracy with the most direct dealings with Eng, and they were defendants." Brief for United States at 20, n.8.

Eng was in custody in Hong Kong from August 16, 1989, until he was extradited to the United States on November 1, 1991. He was convicted following a four week jury trial on all counts related to the drug courier and mail package importation schemes, but was acquitted on the charges stemming from the alleged bean sprout machine scheme. Eng was convicted of the following crimes: continuing criminal enterprise ("CCE"), 21 U.S.C. § 848(a); conspiracy to distribute and possess with intent to distribute heroin, 21 U.S.C. § 846, 841(b); importation of heroin, 21 U.S.C. § 952(a); and distribution and possession with intent to distribute heroin, 21 U.S.C. § 841(a)(1). He was sentenced on the CCE count under the 1987 version of the Sentencing Guidelines to 151 months imprisonment followed by 3 years of supervised release. He was sentenced on each of counts 3 through 14 (the substantive drug offenses) to 292 months imprisonment followed by a life term of supervised release. All the sentences run concurrently.

Discussion

I. Evidence from prior trial

Eng contends that the District Court abused its discretion when it refused to admit the Government's summation, bill of particulars, and grand jury testimony from the *Yu* trial. The evidence that Eng sought to introduce showed that the Government had argued in *Yu* that Tina Wong had delivered the first two packages to Ching-Yi Chen; in the instant case, the Government's evidence showed that Wong had delivered the first package to Eng

believed all the other times, so I will not allow the defense to put in what I see as really extraneous factors with considerable risks for prejudice, when in essence *it can make it[ ]s argument effectively by calling the witnesses themselves and having them testify about the prior occasion* on which they have testified [emphasis added].

The District Court did not exceed its discretion in refusing to admit the evidence at that stage on the basis of defendant's assurance that Tina Wong would testify. The Court assured the defendant that he would have a full opportunity to present the issue of the Government's inconsistency when Tina Wong took the stand. Eng had represented to the Court that Tina Wong was available, and that she would be called to testify. Eng Memorandum to the District Court at 3, n.1 (Nov. 19, 1992) ("It is expected that Tina Wong will be called as a witness at this trial, if not by the government, then certainly by the defense.").

As it turned out, neither the Government nor Eng called Tina Wong to the witness stand. Because Eng failed to renew his motion once it became clear that Wong was not going to be called by either side, he never afforded the District Court an opportunity to consider the need for the evidence from the prior trial under the changed circumstances. He thereby waived his right to object to the District Court's failure to admit the Government's bill of particulars and summation, along with the agent's grand jury testimony. To hold otherwise would allow a defendant to trap the District Court into creating reversible error. The Seventh Circuit has held that if evidence is admitted conditionally, the party seeking to exclude the evidence has the burden of renewing its objection if the

(via Lee), and the second package to "Lap" (at Eng's direction). Tina Wong had testified in *Yu* that she had delivered the first two packages to Ching-Yi Chen. When Eng first moved to admit the evidence from the earlier trial, Judge Raggi denied the motion primarily because she believed that the inconsistency between the Government's position at the two trials would be fully presented to the jury when Tina Wong was called to testify. Judge Raggi explained:

> Most importantly, I think, this issue doesn't have to be addressed because witnesses whose credibility is, after all, at issue, are all available for this jury to hear.
>
> Indeed, defense has candidly stated it will call Tina Wong if the government does not? [punctuation in original]
>
> This is the witness that the government put forward at the Yu trial who has not told the truth or affirmatively perjured her[ ]s[elf].
>
> I think the appropriate way to present this whole conflict to the jury is to have all of these witnesses testify before it and let the jury s[ee] them, their relative demeanors, their credibility in light of other evidence and resolve the question whether or not the government has sustained its burden of proof.
>
> As I indicated the other day, I will allow the defense to explore with Ms. Wong, if she's called, the fact that she was called by the government in the prior trial, she did receive a 5K1.1 letter. . . .
>
> Just as I would never allow the government to vouch for a witness, whether that witness had appeared for the first time or six times previously and

condition is not satisfied. *See United States v. Dougherty*, 895 F.2d 399, 403-04 (7th Cir.), *cert. denied*, 497 U.S. 1008 (1990). The same reasoning applies with equal force here where evidence was, in effect, conditionally excluded.

II. Multi-count sentencing

Eng argues that, in calculating the appropriate offense level, the District Court misapplied the multi-count provisions of the Sentencing Guidelines. Eng claims that because he was convicted of the continuing criminal enterprise offense, which includes a leadership role within its elements, the District Court could not make a four-level increase in his offense level for his leadership role in the crime.

The District Court, applying the multiple-count sentencing guidelines, U.S.S.G. § 3D1.1 - .5 (1987), treated all fourteen counts as being part of one "group." The Court then aggregated the drug quantities under counts 3 through 14 (the non-CCE counts),[1] producing a total of 228 kilograms of heroin. *See id.* § 3D1.2(d).[2] The Court then observed that the guideline for the substantive drug offenses under 21 U.S.C. §§ 952, 846, and 841(a)(1) is section 2D1.1(a)(3). That guideline provides a base offense level of 36 for offenses involving at least 10 kilo-

---

[1] Count 2, charging a conspiracy to distribute and possess heroin with intent to distribute, was merged into count 1, the CCE count.

[2] The 228 kilograms consists of heroin imported in all of Eng's various drug-smuggling schemes. It includes 78 kilograms of heroin smuggled in through the bean sprout washing machine, even though Eng was acquitted of the charges related to the washing machine. We have ruled that facts established by a preponderance of the evidence may generally be used at sentencing, notwithstanding an acquittal for lack of proof that persuaded the trier beyond a reasonable doubt. *See United States v. Concepcion*, 983 F.2d 369, 387 (2d Cir. 1992), *reh'g in banc denied*, 983 F.2d 395 (2d Cir.), *cert. denied*, 114 S.Ct. 163 (1993).

grams of heroin. Because the offenses involved 228 kilograms of heroin, the base offense level was 36. The Court then increased that offense level by 4 to account for the defendant's leadership role in the crime. *See id.* § 3B1.1(a). The Court then compared this adjusted offense level of 40 with the offense level of 32 produced by the remaining, non-aggregated count of the group, the CCE count. Because the offense level produced by the aggregated drug offenses was higher than that produced by the CCE count, the Court used the higher offense level of 40 as the combined offense level for the entire group. *See id.* § 3D1.3(b).

Eng argues that the Court erred in using the offense level for a substantive count as the offense level for the group. He argues that the Court should have used the offense level for the CCE count because that was the most serious count of conviction. We disagree. The Guidelines establish that when counts are grouped together under the quantity aggregating principles of section 3D1.2(d), the offense level for the group is

> the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve varying offenses, apply the offense guideline that produces the highest offense level.

Id. § 3D1.3(b). Thus, the CCE offense could have served as the basis for the combined offense level for the group only if it carried an offense level greater than that carried by the aggregated substantive counts. Because "the offense level corresponding to the aggregated quantity," adjusted for leadership role under Part B of Chapter Three, was greater than the offense level for the CCE offense, the Court properly used it as the basis for the

group. Though the Guidelines refer to the CCE count as "one of the most serious forms of ongoing criminal activity," U.S.S.G. § 2D1.5, commentary (1987), that reference does not mean that the CCE count must always determine the offense level for a group.

Eng also contends that the Court made a second mistake in its multi-count analysis. The Court applied the role adjustment under Part B of Chapter Three to the offense level for the aggregated counts, and then compared that offense level with the offense level for the CCE count, before arriving at the combined offense level for the group. Eng argues that the Court should have first compared the base offense levels for the aggregated counts and the CCE count, picked a combined offense level for the group, and *then* made any adjustments under Parts A, B, and C of Chapter Three. If the Court had done so, Eng continues, it would not have increased his offense level by 4 for his leadership role because that role would have already been accounted for by the inclusion of the CCE offense. Eng relies on a note in the 1992 Guidelines to support his theory that the Guidelines require the Court to group the counts and *then* adjust the combined offense level for the group according to the requirements of Parts A, B, and C of Chapter Three. *See* U.S.S.G. § 3D1.3, comment. (n.3) (1992). The note advises that offense level adjustments under Parts A, B, and C of the Guidelines should be made "based upon the combined offense behavior taken as a whole." *Id.* Eng misunderstands this note's direction, which simply means that courts should consider more than just a defendant's conduct on a particular count when applying Chapter Three, Parts A, B, and C adjustments. *See United States v. Fells*, 920 F.2d 1179, 1184 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2831 (1991). The note does not suggest that a court must apply Chapter

Three, Parts A, B, and C adjustments to the offense level for the group as a whole.[3] *See also* U.S.S.G. § 1B1.1(d) (1987) (requiring sentencing court to apply Chapter Three, Parts A, B, and C adjustments before applying Chapter Three, Part D grouping analysis).

III. The lifetime supervised release term

Finally, Eng contends that the District Court erred in imposing a lifetime supervised release term. He offers two separate arguments for a reversal of the lifetime term, the second of which he makes in response to an issue we raised at oral argument.

1. Improper departure claim

First, Eng argues that the District Court erred in departing upward from the Guidelines' maximum of five years supervised release. *See* U.S.S.G. § 5D3.2(a) (1987). He contends that the District Court violated the *ex post facto* clause of the Constitution by departing upward on a ground not available under the 1987 Guidelines, but only under the 1988 Guidelines. Specifically, Eng asserts that Judge Raggi departed upward because of the quantity of the drugs involved in Eng's drug-smuggling operation. He says that this was an improper ground for departure under the 1987 Guidelines because they already took the amount of drugs into account in setting offense levels. Because of this, Eng concludes that when Judge Raggi departed upward, she must have relied on a 1988 amendment that allowed such upward departures.[4] This argument is with-

[3] We note, however, that adjustments for acceptance of responsibility under Part E of Chapter Three are made only after the counts are combined. *See United States v. Kleinebreil*, 966 F.2d 945, 953 (5th Cir. 1992); *United States v. McDowell*, 888 F.2d 285, 293 (3d Cir. 1989).

[4] Eng apparently thinks the Judge relied on an amendment to U.S.S.G. § 2D1.5, comment. (n.2) (1988), which specifically permitted a depar-

out merit because Judge Raggi could have departed upward on the basis of the amount of drugs even under the 1987 Guidelines.

Judge Raggi explained her departure as follows: "I know that Mr. Eng's criminal history category is one, but the facts in this case do show to the Court that he was involved in large scale heroin trafficking for a considerable period of time, and I do think that the five year supervised release term is inadequate." Thus, Judge Raggi departed upward because of the scale of Eng's smuggling operation.

A sentencing judge may depart from the Guidelines range when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (1988). This departure authority applies to terms of supervised release just as it does to terms of imprisonment. *United States v. Marquez*, 941 F.2d 60, 64 (2d Cir. 1991).

We first note that the District Court departed upward on the substantive narcotics counts, not on the CCE count. The Court could not have departed upward on the CCE offense based on the quantity of heroin involved here (228 kilograms) because the 1987 Guidelines for the CCE offense already accounted for drug quantity. *See* U.S.S.G. § 2D1.5(a)(3) (1987) (imposing offense level of 43 for CCE offense involving 300 kilograms of heroin).

However, with respect to smuggling offenses, the 1987 Guidelines do not make any distinctions between defen-

---

ture above the offense level for a continuing criminal enterprise offense if "the quantity of drugs substantially exceeds that required for level 36." *Id.* App. C, no. 66 (1988). This language was removed the following year. *Id.* App C. no. 139 (1989).

dants based on quantities in excess of 10 kilograms. Thus, in the 1987 Guidelines, the Sentencing Commission did not adequately consider the propriety of terms of supervised release beyond those in the Guidelines range to deal with an extremely large heroin trafficking operation. The District Court was therefore entitled to depart from the supervised release Guidelines' range in order to devise a sentence that reflected its concern over the scale of Eng's narcotics activities.

2. Lifetime supervised release violates statutory maximum claim

At oral argument, we raised a second issue concerning the lifetime term of supervised release—whether the term violates 18 U.S.C. § 3583(b), which appears to set maximum terms of supervised release.[5] The specific question is whether a life term of supervised release violates 18 U.S.C. § 3583(b)(1), which sets a maximum supervised release term of five years for Class A or B felonies,[6] "[e]xcept as otherwise provided."

Eng was convicted under 21 U.S.C. § 841(b)(1)(A), subjecting him to a supervised release term of "at least 5 years" as a first offender. Eng contends that because the minimum term (under section 841(b)(1)(A)) coincides with the maximum term (under section 3583(b)(1)) at five years, Judge Raggi should have set the supervised release term at exactly that period. The Government disagrees, arguing that section 3583(b)(1)'s general maximum of

---

[5] We inquired about this issue *sua sponte* because an imposition of a sentence in violation of law would be plain error. *See United States v. Pico*, 966 F.2d 91, 92 (2d Cir. 1992).

[6] Class A felonies are those for which a maximum punishment of life imprisonment or death is authorized; Class B felonies are those for which a maximum penalty of 20 years or more is authorized. 18 U.S.C. § 3559(a)(1)(A), (B).

five years does not apply in Eng's case because section 841(b)(1)(A) overrides that maximum. We agree with the Government.

The question of how to reconcile the supervised release maximums of section 3583(b) with the supervised release terms allowed under section 841(b) is one of first impression in this Circuit. There are three variations of the problem. The first variation arises where section 841(b) provides a minimum term of supervised release that is *less than* the maximum term of supervised release specified in section 3583(b). This can happen when a defendant faces a four-year supervised release maximum under section 841(b)(1)(B) and a five-year supervised release maximum under section 3583(b)(1). A second category of cases, which includes the instant case, arises where the minimum term specified in section 841(b) is the *same as* the maximum term specified in section 3583(b). This can occur when the defendant is sentenced for a class A felony under section 841(b)(1)(A), and is thus subject (as a first-time offender) to a minimum supervised release term of five years and a maximum term also of five years (for a class A offense). The third category arises where section 841(b) provides a minimum term of supervised release that is *more than* the maximum specified in section 3583(b). That can occur when a defendant has a prior conviction; for example, section 841(b)(1)(A) sets the minimum supervised release term for a repeat offender at 10 years and section 841(b)(1)(B) sets the minimum at eight years, both above the five year maximum of section 3583(b).

Section 3583(b)'s maximums apply unless other statutes provide otherwise. 18 U.S.C. § 3583(b) ("Except as otherwise provided, the authorized terms of supervised release are . . . ."). Cases in the third category described

above clearly fall under the "except as otherwise provided" exception to the general maximum of section 3583(b) because they *require* a supervised release term higher than the maximum allowed by section 3583(b). The question presented is whether the second category also falls under that exception to section 3583(b) requirements. We hold that it does. Eng's reading of this provision would render the "at least" portion of the statute irrelevant. We generally avoid constructions that render portions of a statute superfluous. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). More importantly, Eng's construction ignores the fact that the supervised released terms authorized by Congreess for drug offenses, including section 841, were added in the same statute that amended section 3583(b) by adding the introductory phrase "Except as otherwise provided." Act of Oct. 27, 1986, Pub. L. No. 99-580, 1986 U.S.C.C.A.N. (100 Stat.) 3207. It is apparent that in enacting the Narcotics Penalties and Enforcement Act of 1986 (a subtitle under the Anti-Drug Abuse Act of 1986), Congress intended to enhance the penalties available to combat drug offenses. That Congress intended these penalties to override the maximums set by 18 U.S.C. § 3583(b) is clear from the fact that Congress simultaneously amended that section to add the phrase "[e]xcept as otherwise provided." *See United States v. LeMay*, 952 F.2d 995, 998 (8th Cir. 1991) ("It is obvious to us that the phrase 'except as otherwise provided' was added to § 3583(b) so that this statute would not conflict with statutes such as 21 U.S.C. § 841(b)(1)(A) that authorize supervised release terms in excess of five years."); *United States v. Salazar*, 784 F.Supp. 1366, 1367 (N.D.Ill. 1992); *see also United States v. Cardenas*, 917 F.2d 683, 687 (2d Cir. 1990) (noting, in dictum, that defendant could receive a life term of super-

vised release under section 841(b)(1)(C)'s mandate of a term of "at least 3 years"). Though it would be possible, as Eng argues, to interpret the "except as otherwise provided" clause to authorize longer supervised release terms only where another statute specifically requires such terms (*i.e.*, the third category, described above), we think it is evident that Congress expected the proviso to have a broader effect. ***But see United States v. Gracia***, 983 F.2d 625, 630 (5th Cir. 1993) (section 3583(b) applies to set maximum supervised release term for defendant sentenced for Class C felony); ***United States v. Kelly***, 974 F.2d 22, 24-25 (5th Cir. 1992) (same). Accordingly, we hold that the District Court did not violate 18 U.S.C. § 3583(b) when it sentenced Eng to a lifetime term of supervised release following his term of incarceration.[7]

The judgment of the District Court is affirmed.

---

[7] Because we do not find the penalty statute to be ambiguous, we have no occasion to apply the rule of lenity in Eng's favor. *See United States v. Concepcion*, 983 F.2d at 380.

Appendix B - Decision of the United States District Court For The Eastern District of New York, Read Into The Record on November 24, 1992 [Pages 19a - 28a]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Docket No.
89CR 255

Reena Raggi, USDJ

UNITED STATES OF AMERICA,

- v. -

JOHNNY ENG,

Defendant.

THE COURT: All right. This is a difficult issue principally because the three cases that deal with the problem most directly, McKeon, GAF and Salerno, all come at it from different angles, and I suspect the Second Circuit has not had the last word on this problem.

But considering the cases carefully and the facts before me, I am going to rule against the defendant's application, because this comes up in the midst of a trial and I must rule quickly to allow you to develop your strategies. I'm going to give you my reasons today, orally, though I'm sure that the benefit of time would result in my views being more polished if I were to write.

I want to deal with this question on two levels. First, with the overall concept of dealing with the problem of credibility when the government has put on at one trial a witness, or a group of witnesses, who are its accomplice witnesses in that case, and then at another trial, dealing with the same criminal conduct, put on a different group of witnesses who take a different view of the evidence, after I do that, I then want to discuss the three types of evidence that the defense has sought to put forward, both argument by the Government, testimony by the government agent before a Grand Jury and a bill of particulars.

First of all, with respect to the primary issue that all of this gets to, which is the jurors' assessment of the credibility of a variety of witnesses, some of whom have only recently begun to cooperate with the government.

I do think that we all have to start with the discussion in McKeon of what is properly admissible against the government by way of argument and, as I said the other day, it seems to me that the circuit opinion does seek to distinguish between a lawyer putting forward facts in argument, which could be seen to be within the personal knowledge of that party, and legitimate advocacy by a lawyer.

That is, the urging of inferences to be drawn from facts that are before the jury.

It does seem to me and I think that the court in McKeon recognized that advocacy as to the credibility of

witnesses, falls into the second rather than the first category, and is not generally admissible against a party.

I would find that a lawyer, whether representing the government or a defendant, in arguing the credibility of witnesses who appear at a trial, act as advocates and not as agents for their sides, stating facts. This seems to be particularly the case when credibility is at issue, because no lawyer can vouch for the credibility of a witness and, to that extent, these arguments urging certain conclusions are advocacy; they are not statements of fact akin to what was concern to the court in McKeon.

I also think the probative central hub of a lawyer's arguments on credibility, has to be viewed as minimal, because of the inability to vouch. It is just an argument to be accepted or rejected by a jury based upon its own assessment of the witness and the other evidence before it.

The prejudice of allowing a lawyer's arguments to be used in a case, when it relates to credibility, I think is considerable because it injects into the trial issues that are not properly considered or views not properly considered by a jury in assessing credibility. Namely, the opinions of the lawyers, either at this trial or some past trial.

And so that is why I think that this is not properly seen as the type of facts that would come before a jury in light of the analysis in McKeon. Even though if this issue were properly before the jury, I think the

circumstances of this case suggests, that to go into it would open a door as to testimony about why the government changed its views with respect to the witnesses at the earlier trial, as opposed to now, that were specifically cautioned against in McKeon.

In this case, for the government to have to put on an Assistant U.S. Attorney or an agent, to start to discuss how it came to the views it had in the Yu case or to the views it has now with respect to its witnesses, I think risks diverting the jury's attention from the issues it must properly resolve and risks prejudice to the defendant by allowing the government to bolster its witnesses and I would not allow it.

On the other hand, to go forward with what the defense process says and not permit the government to explain its position is prejudicial to them. Most importantly, I think, this issue doesn't have to be addressed because the witnesses whose credibility is, after all, at issue, are all available for this jury to hear.

Indeed, defense has candidly stated it will call Tina Wong if the government does not?

This is the witness that the government put forward at the Yu trial who has not told the truth or affirmatively perjured her's.

I think the appropriate way to present this whole conflict to the jury is to have all of these witnesses testify

before it and let the jury says them, their relative demeanors, their credibility in light of other evidence and resolve the question whether or not the government has sustained its burden of proof.

As I indicated the other day, I will allow the defense to explore with Ms. Wong, If she's called, the fact that she was called by the government in the prior trial, she did receive a 5K1. letter.

I note, I allow this because it's relevant to her relationship with the parties and her motives in testifying all of which would also properly be before the jury.

The bottom line, by allowing that testimony, it allows the defense to put before the jury the fact that she had at one point been supported, so to speak, by the Government, who, after all, called her to the witness stand, she did get to benefit from her cooperation.

In other words, what I'm saying, there is very little lost to the defense by what it has to do in this case to get the point before the jury.

Now, If we talk about the particular types of evidence that the defense has sought to get this before the jury on, I would say the easiest it appears is Agent Mitesser's testimony. He testified before a Grand Jury as to certain facts relying, as I understand it, on what Ms. Wong had been telling to the government.

This is permissible. In the Grand Jury, as we all know, hearsay is allowed.

For that evidence to come before this jury would require me to explain that whole principle to this jury, explain that Ms. Wong was the source of the information, and then allow the credibility arguments to be made.

For all the reasons I have just stated, since the only reason I see for allowing his testimony to come in is to raise this whole credibility issue, I would not allow it.

The other type of evidence that is sought to be offered is the summation of the government, in which it urged that Ms. Wong's testimony be credited, in which it recounted her version of events as the one that the jury should adopt.

For the reasons I just stated, I would not allow that to come in.

Most troubling is the bill of particulars. A bill of particulars is a very particular type of legal document. Its purpose is to advise a defendant charged with criminal acts of certain facts about the crimes that are essential to that defendant being able to prepare a defense.

It's not simply an opportunity for the government to state its theory of the case. Indeed, the government has no obligation to do that before trial.

The bill of particulars, again, has, as its purpose, allowing a defendant to know sufficient facts about his case to prepare a defense.

Now, in Salerno, as I said the other day, the bill of particulars that --

I'm sorry in GAF.

In GAF, the bill of particulars given that was at issue was swiinst the very same defendant, that then sought to use it against the government at trial.

I think this makes a difference, because what appears to be underlying all of these cases, but particularly GAF and Salerno, is the sense that the government should not be able to treat a defendant unfairly by engaging in radical switches in its theory of the case as against him or it.

In GAF, the circuit viewed what the government did as precisely that. Having tried a case initially on one bill of particulars, and then when a retrial was necessary, switching gears entirely against the same defendant.

In this case, the bill of particulars that the government -- that would be sought to be offered against the government was not given as against Mr. Eng, it was not produced to allow Mr. Eng to prepare a defense.

It was, however, produced in a case in which the

same criminal acts are at issue. That is why this is not easy for me to resolve.

I do not see the same basic unfairness going on. Moreover, and this is where I must start to rely on Salerno for its discussion of where unfairness begins to come into a case. The government is not simply taking the same evidence and switching its theories entirely with no rhyme or reason, there is a major distinction that happened between the Yu case and this case, and that is the government has now spoken to people who were defendants in that case who are now cooperating in this case.

It has polygraphed its former witness in that case and I gather has not received an encouraging report about her credibility.

I am not resolving which witnesses are telling the truth. It's the cross-examination of the last several days has shown, the government's witnesses would have to be viewed cautiously by any fact-finder. But that is what I want to focus the jury's attention on.

Is there assessment of these people who have appeared before them, and the other evidence that is properly before the jury?

I do not want the focus to turn on who the government believed, when and why they believed that person. Just as I would never allow the government to vouch for a witness, whether that witness had appeared for

the first time or six times previously and believed all the other times, so I will not allow the defense to put in what I see as really extraneous factors with considerable risks for prejudice, when in essence it can make it's argument effectively by calling the witnesses themselves and having them testify about the prior occasion on which they have testified.

Mr. Shargel, you spoke this afternoon about not giving the government the benefit of a clean slate. Maybe this case will not go to the jury with all the facts and details that you think are relevant and that you argued for. This won't be a clean slate.

This is not a jury that will be ignorant of the use of Mr. Yu, Ms. Lee, how they came to be cooperating, the stages at which certain things came about, the fact that Tina Wong testified before and she is now not a government witness. All of that will be before this jury.

I don't see this as being a case in which the government is starting on a clean slate and hiding everything that you argued to me.

Also, with respect to the second point that you made this afternoon, about the government being led by its witnesses and the problems of jurors not knowing that. That is of course something that I'm sure will trouble many defendants and many defense counsel, just as the defense could not seek to offer evidence about how the government has dealt with accomplices generally and whether anybody

has been prosecuted in the Eastern District or Southern District for perjury, however relevant defense counsel might be able to argue that perhaps should be, I think in this case the fact that the government believed somebody at one time or another I won't let come in except as to Ms. Wong who will be able to testify.

I'm sure that is not the clearest denunciation of my ruling because of the time. I think you have the general idea and will have it preserved if it has to be reviewed.

I thank you.